CENTRAL PROVIDENT FUND BOARD v. HO BOCK KEE

[C.A. (Wee Chong Jin C.J., Chua & Choor Singh JJ.) March 5, 1981]

[Singapore — Civil Appeal No. 29 of 1980]

Contract — Alleged breach of conditions — Notice to terminate — Specific conditions for termination in contract — Whether notice effective — Special case stated.

Arbitration — Case stated — Arbitration Act (Cap. 16), s. 28(1)(a).

This is an appeal against the decision of Rajah J. (see [1981] 1 M.L.J. 80). The facts are briefly as follows. By a contract in writing dated June 4, 1971 the respondent, a contractor agreed to erect a large building for the appellants at Robinson Road, Singapore. The said contract contained Conditions of Contract. Subsequently, the parties entered into a supplementary agreement which made certain variations to the contract. The Conditions of Contract contained an Arbitration Clause. Disputes and differences having arisen between the parties within the scope of the Arbitration Clause an Arbitrator was appointed to hear and determine such disputes.

During the carrying out of the works by the respondent, the appellants purported to exercise their rights under clause 34(a) of the Conditions of Contract to determine the Contract under Clause 34(a) of the Conditions of Contract. The respondents argued that the purported determination was unjustified on the facts and the procedure prescribed by clause 34(a) and clause 1A(d) of the Conditions for determination of the Contract was not followed.

On October 25, 1974, the Superintending Officer gave Notice to the claimant pursuant to the provisions of clause 34(a) that in his opinion the claimant failed to proceed with reasonable diligence with the works and that the claimant was accordingly in default under the provisions of clause 34. The said Notice also stated that in the event that such default should continue for 7 days after October 25, 1974, the said Superintending Officer reserved the right to determine the contract. On November 2, 1974, the Chairman of the respondent Board gave Notice to the claimant terminating the contract with effect from the date of notice. Both Notices of October 25, 1974 and November 2, 1974 bore the words "A.R. Registered" but were sent by hand.

Several questions were posed before the High Court:—

(1) Is the Notice of October 25, 1974 invalid on account of its having been given by the Superintending Officer?

(2) Is the Notice of October 25, 1974 invalid on account of its not having been sent by registered post?

(3) Is the Notice of November 2, 1974 invalid on account of there being no valid notice of default?

(4) Is the Notice of November 2, 1974 invalid on account of its not having been sent by registered post?

(5) Does the Arbitrator under clause 40 have power to review and revise the Notice of October 25, 1974.

The High Court answered Questions (1) and (5) in the negative and Questions (2), (3) and (4) in the affirmative. The appellants appealed against the decision of the High Court in respect of Questions (2), (3) and (4) and the respondent appealed against the decision of the High Court in respect of Questions (1) and (5).

Held: (1) the giving of the first notice under clause 34(a) is the taking of action on behalf of the Board and on the true construction of clause 1A(d) is reserved to the Chairman alone. Accordingly, the answer to the first question should have been in the affirmative;

(2) the requirement of registered post is for the protection of the contractor in that he is duly warned that the determination procedure has been operated and must take immediate steps to rectify the specified defaults within the time limit prescribed in the clause; The provision of this method of service no doubt was also intended for the purpose of avoiding subsidiary disputes between the parties to the contract as to whether the notice was given or received as it provides for a mode of service and receipt of the required notice which can be corroborated from an independent and official source. The trial judge was correct in answering Question 2 in the affirmative;

(3) it follows from the answer to Question 1 that the answer to Question 3 must be in the affirmative;

(4) it follows from the answer to Question 2 that the answer to Question 4 must be in the affirmative;

(5) clause 40 empowers the Arbitrator "to review and revise any . . . notice". The Arbitrator is clearly empowered to review and revise a notice even if it is a notice which is a procedural step in a forfeiture clause. The said clause also contemplates that the Arbitrator shall have power to go behind a notice, including procedural notices. If a dispute arises as to whether a factual situation had arisen as would justify a notice under clause 31(a), then that dispute falls within the expression "all matters in dispute which shall be submitted to him in the same manner as if no such notice had been given". In the present case, the qualifying event is if the contractor is in default which is a factual situation which is in dispute; the answer to question 5 should have been in the affirmative.

Cases referred to:-

(1) *Goodwin & Sons* v. *Fawcett* (1945) Estates Gazette 186.

(2) *Eriksson* v. *Whalley* [1971] 1 N.S.W.L.R. 397.

(3) *Yates Building Co. Ltd.* v. *Pulleyn & Sons* (York) Ltd. (1976) Estates Gazette.

(4) *United Overseas Land* v. *Loke Hong Kee* [1981] 1 M.L.J. 5, C.A.

CIVIL APPEAL.

A.J. Butcher Q.C. (*Goh Heng Leong* with him) for the appellants.

Desmond Wright Q.C. (*Wong Meng Meng* with him) for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering the judgment of the Court): By a contract in writing made June 4, 1971 the respondent who is a contractor agreed to erect a large building for the appellants at Robinson Road, Singapore (the work to be carried out under the contract is hereinafter referred to as "the works"). The contract contained Conditions of Contract. Subsequently, the parties entered into a Supplementary Agreement which made certain variations to the contract. The Conditions of Contract contained an Arbitration Clause. Disputes and differences having arisen between the parties within the scope of the Arbitration Clause an Arbitrator was appointed to hear and determine such disputes.

The parties having agreed that certain questions of law arise asked the Arbitrator to state a Special Case for the decision of the High Court. During the carrying out of the works by the respondent the appellants purported to exercise their rights under Clause 34(a) of the Conditions of Contract to determine the contract.

The respondent contended before the Arbitrator that such purported determination was unjustified because, *inter alia*, the procedure for determination required by the contract was not followed and it is in this regard that the Special Case arises. The following facts were agreed: —

"(1) By notice in writing dated the 25th October 1974 Mr. Seah signing himself as Superintending Officer gave notice to the respondent pursuant to the provisions of Clause 34(a) in his opinion the respondent was failing to proceed with reasonable diligence with the Works and that

the respondent was accordingly in default under the provisions of Clause 34. Such notice also informed the respondent that in the event that such default should continue for seven days after the 25th October 1974, Mr. Seah reserved the right without prejudice to any other rights under the Contract to determine the Contract in which event Mr. Seah would advise the appellants of their rights under the provisions of Clause 34(d) of the Conditions.

(2) Although the notice dated the 25th October 1974 bears the words 'A.R. Registered', it was not sent by registered post but was delivered by hand by Mr. Seah on the 25th October 1974 to Mr. Ho Chung Kee, a member of the respondent's staff.

(3) By notice in writing dated the 2nd November 1974 the Chairman of the appellant Board gave notice to the respondent terminating the Contract with effect from the date of the notice.

(4) Although the notice dated the 2nd November 1974 bears the words 'A.R. Registered', it was not sent by registered post but was delivered by hand on the 2nd November 1974 to Mr. Michael Chan, a member of the respondent's staff."

The notice dated 25th October 1974 reads: —

"Messrs. Ho Bock Kee
597-A Geylang Road
Singapore 14

RE: CENTRAL PROVIDENT FUND BOARD BUILDING AT ROBINSON ROAD — CONTRACT NO. PWD 288/1971

I HEREBY GIVE YOU NOTICE pursuant to the provisions of clause 34(a) of the Conditions of Contract forming part of the Contract dated the 4th June, 1971, and made between you and the Central Provident Fund Board for the construction of the Central Provident Fund Board building at Robinson Road, Singapore that in my opinion you are failing to proceed with reasonable diligence with the Works specified in the said contract and the Supplemental Agreement dated 7th February, 1974 and that you are accordingly in default under the provisions of clause 34 aforesaid. Particulars of your failure are set out in the schedule to this Notice. I also hereby give you notice that in the event that such default shall continue for seven days after the date of this Notice, I reserve the right without prejudice to any other rights under the said Contract to determine the said Contract, in which event I shall advise the Central Provident Fund Board of their rights under the provisions of clause 34(d) of the said Conditions of Contract.

Dated this 25th day of October 1974

Sd: (illegible)
Superintending Officer

cc Chairman, CPF Board
General Manager, CPF Board
DPW."

The notice dated 2nd November 1974 reads: —

"*A R REGISTERED*

M/s Ho Bock Kee General Contractor
597A Geylang Road
Singapore 14

WHEREAS:

(i) By a Contract dated the 4th June 1971 and made between you, Ho Bock Kee and the Central Provident Fund Board it was agreed that you would construct the Central Provident Fund Building at Robinson Road for the consideration therein stated.

(ii) By Condition 34(a) of the conditions of the said contract the Superintending Officer is empowered to terminate the said contract after giving you, by registered post, notice of default and upon your failure to comply therewith within seven days of the date of the said notice.

(iii) Notice of Default was served upon you and you have failed to comply with such notice.

NOW TAKE NOTICE that I the Chairman acting under powers reserved by Condition 34 of the said contract hereby terminate the said contract with effect from the date of this notice.

Dated the 2nd day of November, 1974.

Sd: William Cheng
Chairman
Central Provident Fund Board."

The questions of law stated in the Special Case are: —

(1) Is the notice of the 25th October 1974 invalid on account of its having been given by Mr. Seah?

(2) Is the notice of the 25th October 1974 invalid on account of its not having been sent by registered post?

(3) Is the notice of the 2nd November 1974 invalid on account of there being no valid notice of default?

(4) Is the notice of the 2nd November 1974 invalid on account of its not having been sent by registered post?

(5) Does the Arbitrator under Clause 40 have power to review and revise the notice of the 25th October 1974?

The High Court answered Questions (1) and (5) in the negative and Questions (2), (3) and (4) in the affirmative. The appellants now appeal against the decision of the High Court in respect of Questions (2), (3) and (4) and the respondent appeals against the decision of the High Court in respect of Questions (1) and (5).

Question 1.

The answer to this question depends on the true construction of Clause 1A(d) and Clause 34(a) of the Conditions of Contract. Clause 1A(d) reads: —

"1A. (d) Notwithstanding any provision to the contrary in these Conditions contained, it is hereby agreed that the right to take action and/or initiate proceedings on behalf of the Board under Clauses 31, 32, 34, 35 or 40 hereof is expressly reserved to the Chairman, Central Provident Fund Board."

Clause 34(a) reads: —

"34(a) Default — If the Contractor shall make default in any of the following namely:

(i) without reasonable cause wholly suspends the Works before completion;

(ii) fails to proceed with the Works with reasonable diligence;

(iii) refuses or to a substantial degree persistently neglects after notice in writing from the Superintending Officer to remove defective work or improper materials,

then, if any such default shall continue for seven days after a notice sent by registered post to the Contractor from the Superintending Officer specifying the same, the Superintending Officer may without prejudice to any other rights herein contained thereupon by notice sent by registered post determine this Contract; provided that notice hereunder shall not be given unreasonably or vexatiously and such notice shall be void if the Board is at the time of the notice in breach of this Contract."

It is not in dispute that a forfeiture clause in a building contract will be strictly construed to see whether the operative event has occurred or not. Clause 1A(d) of the Conditions of Contract expressly reserved to the Chairman, Central Provident Fund Board the "right to take action ... on behalf of the Board under Clauses 31, 32, 34, 35 or 40" notwithstanding any provision to the contrary in the Conditions of Con-

tract. Clause 34(a) gives the power to give a seven day default notice to the Superintending Officer (Mr. Seah). It seems to us plain that if Mr. Seah sends a seven day notice under Clause 34(a) he is exercising the power given to him by that clause and in so doing he is exercising the right to take action under Clause 1A(d). Mr. Butcher on behalf of the appellants, contends that as Clause 1A(d) relates only to actions taken and proceedings initiated "on behalf of the Board" it ought to be construed only to reserve to the Chairman those functions which are ascribed to the Board itself by Clauses 31, 32, 34, 35 and 40 as distinct from those functions where the Superintending Officer is acting in his independent capacity as "architect" in charge of the project, such as the first notification under Clause 34(a) which depends for its responsible exercise upon a detailed acquaintance with events on site during the ordinary progression of work.

We are unable to accept such a strained construction on the meaning of Clause 1A(d) and in our opinion the giving of the first notice under Clause 34(a) is the taking of action on behalf of the Board and on the true construction of Clause 1A(d) is reserved to the Chairman alone. Accordingly, the answer to the first question should have been in the affirmative.

Question 2.

Is the notice of the 25th October 1974 invalid on account of its not having been sent by registered post?

The answer to this question depends on the interpretation of Clause 34(a) of the Conditions of Contract. Did the parties to the agreement intend, by the words "notice to be sent by registered post", that the notice specifying the default on the part of the contractor must be sent by registered post and not sent by other method? In other words, are the words "sent by registered post" mandatory or merely directory. Two cases directly in point have been cited to us. One is an English case and the other Australian. In both cases the clause in question is similar to Clause 34(a).

Stevenson J. in the English case of *Goodwin & Sons* v. *Fawcett*[1] decided that the words were not mandatory. He said that "only on the strictest construction" of the clause could the view that the notice determining the builder's employment was not valid because it was sent to the builder by recorded delivery and not by registered post as required under the contract be supported. He arrived at his decision by construing the whole contract "in a common-sense business way as a building contract".

Collins J. in the Australian case of *Eriksson* v. *Whalley*[2] decided that a notice by the architect to the builder pursuant to a clause of the contract specifying certain matters of default handed to the builder's foreman and not sent by registered post as specified in the clause was not a valid notice. He took the view that "the parties agreed in imperative terms that the ... notice should be given by registered post" and that "the provision of this method of service no doubt was intended for the purpose of avoiding subsidiary disputes between the parties to the contract as to whether the notice was given or received as it provides for a mode of service and receipt of the required notice which can be corroborated from an independent and official source".

We were referred to another case, *Yates Building Company Ltd.* v. *Pulleyn & Sons (York) Ltd.*[3] The question in that case was whether an option to purchase land had been validly exercised by the option holder. The option clause reads: —

"The option hereby granted shall be exercisable by notice in writing given by or on behalf of Yates to Pulleyns or to Pulleyns' solicitors at any time between April 6, 1973 and May 6, 1973 such notice to be sent by registered or recorded delivery post to the registered office of Pulleyns or the offices of their said solicitors."

On April 30, 1973 the solicitors for the buyers sent a letter by ordinary post to the solicitors for the sellers exercising the option on behalf of the buyers. Although the letter was received well in time the sellers' solicitors replied stating that the letter had not been sent by registered post as provided for in the option clause. In an action for specific performance by the buyers the judge held that the requirement that the notice in writing had to be sent by registered post or recorded delivery was a requirement that must be complied with. On appeal the Court of Appeal held that the option had been validly exercised.

Lord Denning in his judgment took the view that the object of the provision was for the benefit of the buyer so that he can be sure of his position. He said (at p. 126): —

"So long as he sends the letter by registered or recorded delivery post, he has clear proof of postage and of the time of posting. But if the buyer sends it by ordinary post, he will have no sufficient proof of posting, or the time of posting. In that case, if the seller proves that he never received it, or received it too late, the buyer fails. None of those reasons apply, however, when the seller does receive it in time. So long as he gets the letter in time, he should be bound. So I would hold, simply as a matter of interpretation, that if the letter did reach the sellers in time, it was a valid exercise of the option."

Lord Scarman said (at p. 128): —

"I agree with the Master of the Rolls that the one question before the court is the interpretation of clause 2 of the option agreement. I read that agreement as requiring the option to be exercised by a notice in writing which is to be actually received by Pulleyns or Pulleyns' solicitors. When later in the clause one comes to the words which have to be construed in this case 'such notice to be sent by registered or recorded delivery post,' I think they are a clear indication, and are intended as such to the offeree, that if there is to be any issue as to whether or not the notice has in fact been received, he had better use registered or recorded delivery post if he wishes to put it beyond doubt. Of course, if there was any such issue, the burden would be upon the party seeking to exercise the option to prove that his notice had been received. The clause is a clear indication that one would most easily and most efficaciously discharge that burden by using registered or recorded delivery post."

Mr. Butcher for the appellant relies on *Yates'* case. He submits that the key to the answer lies in considering the object to be achieved by service by registered post rather than by other means. He concedes that if there were any advantage to the contractor (the respondent) to be derived from service by registered post rather than by some other effective means such service might be mandatory. His submission is that there could be no such advantage and that the purpose of the provision for service by registered post can only be to enable the Board to avail

itself of the proof of postage and service which the use of registered post secures.

Mr. Wright for the respondent submits that the requirement of registered post is not only for the protection of the employer (the appellant) so that he may have proof of service, but it is also for the protection of the contractor (the respondent) so that he may be warned that the determination procedure is being operated. He further submits that, applying the principle that forfeiture clauses must be strictly construed, a notice under Clause 34(a) which is not sent by registered post would not be a compliance with the requirements of Clause 34(a) which is a forfeiture clause.

In the present case the parties have expressly provided that the notice specifying the default on the part of the contractor is to be "sent by registered post". No alternative mode of service is provided for in the clause. Accordingly, we are unable to agree with Mr. Butcher that the sole purpose or object of the clause is to enable the Board to avail itself of the proof of postage and service which the use of registered postage secures. We are inclined to agree with Mr. Wright that the requirement of registered post is also for the protection of the contractor in that he is duly warned that the determination procedure has been operated and must take immediate steps to rectify the specified defaults within the time-limit prescribed in the clause. We share the view expressed by Collins J. in *Eriksson* v. *Whalley, supra,* that the provision of this method of service no doubt was intended for the purpose of avoiding subsidiary disputes between the parties to the contract as to whether the notice was given or received as it provides for a mode of service and receipt of the required notice which can be corroborated from an independent and official source.

In our opinion the trial judge was correct in answering this question in the affirmative.

Question 3.

Is the notice of the 2nd November 1974 invalid on account of there being no valid notice of default?

It follows from our answer to Question 1 that the answer to this question must be in the affirmative.

Question 4.

Is the notice of the 2nd November 1974 invalid on account of its not having been sent by registered post?

It follows from our answer to Question 2 that the answer to this question must be in the affirmative.

Question 5.

Does the Arbitrator under Clause 40 have power to review and revise the notice of 25th October 1974?

The relevant provisions of Clause 40 read as follows: —

"The arbitrator shall have power to review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given."

The answer to this question depends upon whether or not, on the true construction of the contract, a first notice under Clause 34(a) is intended to be open to subsequent question. Clause 40 expressly confers on the Arbitrator power "to review and revise any . . . notice". The Arbitrator is clearly empowered to review and revise a notice even if it is a notice which is a procedural step in a forfeiture clause. Clause 40 also expressly confers on the Arbitrator power "to determine all matters in dispute . . . in the same manner as if no such . . . notice had been given." The clause clearly contemplates that the Arbitrator shall have power to go behind a notice, including procedural notices. If a dispute arises as to whether a factual situation had arisen as would justify a notice under Clause 31(a), then that dispute falls within the expression "all matters in dispute which shall be submitted to him in the same manner as if no such notice had been given."

The case of *United Overseas Land* v. *Loke Hong Kee*[4] which the appellants rely on is distinguishable. That case did not decide that a notice is not open to review or revision by the Arbitrator under the arbitration clause. It was decided on the particular facts of that case. The parties had by Article V Clause 3 of a Supplemental Agreement agreed, *inter alia,* that in the event of the progress of the works being in the opinion of the Architect unsatisfactory then upon the recommendation of the Architect in writing and in addition to the employer's rights under the Main Contract the employer should be at liberty to determine the employment of the contractor under the Main Contract forthwith.

Subsequent to the Supplemental Agreement the Architect by a letter to the employer stated he was of the opinion that progress of the works was unsatisfactory and recommended that the employer ought to determine the contractor's employment. The employer acting on the Architect's recommendation determined the contractor's employment. The main dispute between the parties was whether the contractor's employment had been lawfully determined.

The question posed for the decision of the court was whether the arbitrator was entitled to open up review or revise an opinion of the Architect under Article V Clause 3 of the Supplemental Agreement pursuant to the arbitration clause in the Main Contract. The Court of Appeal answered the question in the negative. It took the view that on the true construction of the Supplemental Agreement and the Main Contract the only meaning of Article V Clause 3 is that the employer had a right to determine the contractor's employment if the Architect was of the opinion, arrived *bona fide,* that progress of the works was unsatisfactory and that the arbitration clause did not confer jurisdiction on the arbitrator to review the opinion of the Architect.

In that case the parties had expressly agreed that the opinion of the Architect was the qualifying event for determination of the contract. In our case the qualifying event is if the contractor is in default which is a factual situation which is in dispute.

Accordingly, the answer to this question should have been in the affirmative.

Order accordingly.

Solicitors: *Allen & Gledhill; Lee & Lee.*